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Chapter 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. Immigration and Nationality Act

On June 13, 2011, the Supreme Court affirmed the decision of the U.S. Court of Appeals for the Ninth Circuit upholding provisions of the Immigration and Nationality Act, as amended (“INA”) that prescribe the eligibility requirements for U.S. citizens to transmit citizenship to their children born out of wedlock outside the United States. *Flores-Villar v. United States*, 130 S.Ct. 1878 (2011). By a vote of four to four (Justice Kagan was recused), the Supreme Court allowed the Ninth Circuit’s decision to stand without issuing an opinion. The Ninth Circuit’s decision rejected a constitutional challenge to provisions of the INA on equal protection grounds based on the longer requirement for presence in the United States for a U.S.-citizen father than for a U.S.-citizen mother to transmit U.S. citizenship to a child. See *Digest 2010* at 1-6.

2. ILC Draft Articles on Nationality

On October 17, 2011, Steven Hill, Counselor to the U.S. Mission to the UN, spoke on the views of the United States on the work of the General Assembly’s Sixth (Legal) Committee relating to the nationality of natural persons in the event of state succession. Mr. Hill’s remarks appear below and are available at

<http://usun.state.gov/briefing/statements/2011/177345.htm>.

* * * *

We greatly appreciate the Sixth Committee’s continued interest in this important item. We also appreciate the efforts of the ILC in preparing draft articles on the nationality of natural persons in relation to the succession of States.

Statelessness in the context of state succession can affect democratization, economic development, and regional stability. We agree with the basic tenet of the draft articles that individuals affected by the succession of States must possess the nationality of at least one of the successor States. Moreover, we urge governments to review their nationality laws to ensure that they do not discriminate against women, members of minority and other vulnerable groups, and to ensure that stateless individuals present within their borders are provided with documentation, protection from abuse, and access to basic services.

As seen in many of the written observations of member states, however, approaches to statelessness that might occur as the result of state succession should take into account factors such as the individual right of expatriation and other legitimate concerns of states in determining policies related to nationality. The balancing of these important considerations merits additional examination and discussion. We believe that the written observations provided by Member States to date in response to several resolutions of the General Assembly provide very useful insights into the perspectives and practices of those States, and we look forward to reviewing any additional member state submissions and to exploring these issues in as practical a manner as possible.

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B. PASSPORTS

1. Western Hemisphere Travel Initiative Implementation

On June 9, 2011, the Department of Homeland Security (“DHS”) issued a notice, effective on the same date, that the Tribal Card issued by the Pascua Yaqui Tribe is an acceptable document for identity and citizenship for purposes of entering the United States under the Western Hemisphere Travel Initiative (“WHTI”). 76 Fed. Reg. 33,776 (June 9, 2011). For further information on the WHTI, see *Digest 2007* at 8-16.

2. Authority to Determine Content of Passports to Implement Foreign Policy

See Chapter 9.C. for a discussion of the United States brief submitted in the Supreme Court in *Zivotofsky v. Secretary of State*.

C. IMMIGRATION AND VISAS

1. Visa Agreement between the United States and Russia

On July 13, 2011, Secretary of State Hillary Rodham Clinton and Russian Foreign Minister Sergey Lavrov announced an agreement between the United States and Russia on the issuance of nonimmigrant business, tourist, private, and humanitarian visas to the Russian Federation, and for business and tourist visas to the United States, as well as short-term official travel visas to both countries. A July 13, 2011 Fact Sheet issued by the State Department explained that the agreement followed on the joint statement issued during the meeting of President Obama and Russian President Dmitry Medvedev in Deauville, France on May 26, 2011. The July 13 Fact Sheet, available at www.state.gov/r/pa/prs/ps/2011/07/168346.htm, explained:

This agreement will facilitate travel between our two countries and establish stronger ties between our people. The agreement benefits the largest segments of our traveling Americans and Russians—business travelers and tourists, traveling both as individuals

and in groups, by granting as a rule, on a reciprocal basis, multiple-entry visas valid for 36 months.

The agreement also streamlines the visa issuance process by reducing the documentation required. These new visa validity periods will allow for expanded contacts and promote greater mutual understanding between our societies.

On November 19, 2011, Secretary Clinton and Foreign Minister Lavrov exchanged diplomatic notes on the new agreement, bringing it closer to entry into force. A November 19 State Department Fact Sheet, available at www.state.gov/r/pa/prs/ps/2011/11/177398.htm, explained that after the Russian Duma ratifies the agreement, an additional exchange of notes confirming completion of internal procedures would bring the agreement into force. At the end of 2011, the agreement had not yet entered into force.

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2. Elimination of National Security Entry-Exit Registration System (NSEERS)

On April 28, 2011, the Department of Homeland Security (“DHS”) announced that it was eliminating requirements under the National Security Entry-Exit Registration System (“NSEERS”) that nonimmigrant nationals from certain designated countries comply with special registration requirements, including provision of fingerprints, a photograph, and additional information when applying for admission at a U.S. port of entry. 76 Fed. Reg. 23,830-31 (Apr. 28, 2011). The notice in the Federal Register explained that the Department of Justice had created NSEERS in 2002 pursuant to sections 262(a) and 263(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1302(a) and 1303(a). Regulations under NSEERS provided that the Secretary of Homeland Security, upon consultation with the Secretary of State, would designate certain countries whose nationals would be required to comply with the special registration requirements. Countries so designated included: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. The notice explained the rationale for eliminating NSEERS requirements:

Since its establishment in 2003, DHS has developed substantial infrastructure and adopted more universally applicable means to verify the entry and exit of aliens into and out of the United States. Improved intelligence exchange between the United States and other countries has further informed DHS’s understanding of the threat posed to the United States by international terrorism. Based on global and individualized intelligence, DHS has refined its approach to identifying aliens posing a threat to the nation and applied these techniques to foreign national non-immigrants generally. As threats to the United States evolve, DHS seeks to identify specific

individuals and actions that pose specific threats, rather than focusing on more general designations of groups of individuals, such as country of origin. DHS has implemented and improved the data systems that support individualized determinations of admissibility. DHS established the United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”), in January 2004, to record the arrival and departure of aliens; verify aliens’ identities; and authenticate and biometrically compare travel documents issued to non-U.S. citizens by DHS and the Department of State.* Under U.S.-VISIT requirements, most aliens seeking admission to the United States must provide finger scans and a digital photograph upon entry to the United States at U.S. ports of entry. . . . In light of the development of and improvements to the Department’s information collection systems and international information sharing agreements, the Secretary has determined that subjecting nationals from designated countries to a special registration process that manually recaptures data already collected through automated systems is redundant and does not provide any increase in security. After careful consideration, the Secretary of Homeland Security, by this notice, is removing all currently designated countries from the listing of countries whose nationals and citizens are required to comply with NSEERS registration requirements.

76 Fed. Reg. 23,830 (Apr. 28, 2011).

3. Expanded authority of consular officers to revoke visas

On April 27, 2011, the Department of State announced a change to its regulations in order to expand the authority of consular officer to revoke visas at any time, in their discretion. 76 Fed. Reg. 23,477-79 (Apr. 27, 2011). The notice in the Federal Register explained why the rule was being changed:

On occasion, after a visa has been issued, the Department or a consular officer may determine that a visa should be revoked when information reveals that the applicant was originally or has since become ineligible or may be ineligible to possess a U.S. visa. Section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i)) (INA) authorizes the Secretary and consular officers to revoke a visa in their discretion. Current regulations limit the circumstances in which consular officers may revoke visas. In light of security concerns, this amendment grants additional authority to consular officers to revoke visas, consistent with the statutory provisions of the INA. Although this rule eliminates the provisions that permit reconsideration of a revocation, it also allows for the provisional revocation of a visa when there is a need for further consideration of information that might lead to a final revocation.

Id.

* Editor’s Note: For background on the US-VISIT program, see *Digest 2004* at 27-29.

4. Presidential Proclamation Suspending Entry of Human Rights Abusers

On August 4, 2011, President Barack Obama issued Presidential Proclamation 8697, “Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses.” Daily Comp. Pres. Docs., 2011 DCPD No. 00548, p. 1. President Obama issued the proclamation pursuant to the U.S. Constitution and laws, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. § 1182(f)), and 3 U.S.C. § 301. The proclamation included the President’s determination that it was in the interests of the United States, based on its enduring commitment to respect for human rights, to ensure that the United States is not a safe haven for serious violators of human rights and humanitarian law and those who engage in related abuses. Before issuance of the Proclamation, only those human rights violations specifically enumerated in the Immigration and Nationality Act (e.g., genocide, torture, extra-judicial killings, certain violations of religious freedom) were grounds for inadmissibility to the United States. The Proclamation expanded the grounds for denial of entry into the United States to cover a broader array of recognized violations of international humanitarian law and international criminal law, such as war crimes and crimes against humanity. The proclamation also covers participants in serious human rights violations, such as prolonged arbitrary detention, forced disappearances, slavery, and forced labor, as well as participants in widespread or systematic violence against civilians based on ethnicity or other grounds. The Proclamation was an integral part of President Obama’s broader initiative to strengthen the United States’ ability to prevent mass atrocities abroad, including the establishment of an Atrocities Prevention Board tasked with developing atrocity prevention strategies, discussed in Chapter 17.C.1. Sections 1 through 5 of the Proclamation appear below.

* * * *

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.

(b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where the entry of such person would not harm the foreign relations interests of the United States.

Sec. 3. The Secretary of State, or the Secretary's designee, in his or her sole discretion, shall identify persons covered by section 1 of this proclamation, pursuant to such standards and procedures as the Secretary may establish.

Sec. 4. The Secretary of State shall have responsibility for implementing this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of Homeland Security, may establish.

Sec. 5. For any person whose entry is otherwise suspended under this proclamation entry will be denied, unless the Secretary of State determines that the particular entry of such person would be in the interests of the United States. In exercising such authority, the Secretary of State shall consult the Secretary of Homeland Security on matters related to admissibility or inadmissibility within the authority of the Secretary of Homeland Security.

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D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES

Section 244A of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240–47; *Digest 2004* at 31–33; and *Digest 2010* at 10–11. In 2011, the United States extended TPS designations for Haiti, Sudan, South Sudan, Honduras, and Nicaragua, as discussed below.

1. Haiti

On May 19, 2011, the Secretary of Homeland Security simultaneously extended Haiti's designation for TPS and redesignated Haiti for TPS for a period of 18 months, through January 22, 2013. 76 Fed. Reg. 29,000 (May 19, 2011). See *Digest 2010* at 10–11 for discussion of the original designation of Haiti for TPS on January 21, 2010. Excerpts below from the Federal Register notice announcing the extension and redesignation explain the basis for the action.

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Over the past year, DHS [the Department of Homeland Security] and the Department of State (DOS) have continued to review conditions in Haiti. Based on this review, and after consulting with DOS, the Secretary has determined that an 18-month extension of Haiti's TPS designation from July 23, 2011 through January 22, 2013, is warranted because the conditions prompting the original designation continue to be met. The Secretary has further determined that these same conditions in Haiti support redesignating Haiti for TPS under INA section 244(b)(1)(C) and changing the "continuous residence" and "continuous physical presence" dates so as to continue affording TPS protection to eligible Haitians who arrived in the United States before January 12, 2010 and to extend TPS protection to eligible Haitians who arrived between January 12, 2010 and January 12, 2011.

The January 12, 2010 earthquake has exacerbated Haiti's position as the least-developed country in the Western Hemisphere and one of the poorest in the world. ...

According to the GoH [Government of Haiti], an estimated 230,000 people died and approximately three million were affected by the earthquake. In total, more than one million Haitians have been left homeless and are currently living in temporary camps. ...

... DOS estimates that there are approximately 1,300 internally displaced persons (IDPs) camps in Haiti. Although statistical reports vary, the United Nations Children's Fund (UNICEF) reports that there are approximately 1.6 million IDPs, of which approximately 800,000 are children. The IDP camps are extremely crowded and are vulnerable to flooding, crime (including gender-based violence), and disease.

... The current cholera outbreak in Haiti is evidence of the vulnerability of the public health sector of Haiti. Although statistical reports have varied, the GoH Ministry of Public Health and Population reported 199,497 cholera cases, including 112,656 hospitalizations and 3,927 deaths. Health officials and aid organizations believe the outbreak may spread nationwide. In efforts to contain the outbreak, a network of cholera treatment centers has been created.

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2. Sudan and South Sudan

On October 13, 2011, the Department of Homeland Security ("DHS") announced the extension of the designation of Sudan for TPS for 18 months through May 2, 2013. 76 Fed. Reg. 63,635 (Oct. 13, 2011). In a separate notice on the same day, DHS announced the designation of the newly-created Republic of South Sudan for TPS for a period of 18 months, through May 2, 2013. 76 Fed. Reg. 63,629 (Oct. 13, 2011). Both the extension and the designation were based on the determination that there was an ongoing armed conflict in Sudan and South Sudan and that extraordinary and temporary conditions exist that prevent nationals of either country from returning in safety. Excerpts below from the Federal Register notice of the designation of the Republic of South Sudan for TPS describe conditions in South Sudan that satisfy the criteria for designation. The notice of the extension for Sudan (not excerpted) includes a similar description.

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On July 9, 2011, South Sudan became the world's newest nation. Formal independence for South Sudan concluded the interim period of the January 2005 Comprehensive Peace Agreement (CPA) that ended more than two decades of civil war between the Government of Sudan in Khartoum and the Sudan People's Liberation Movement/Army (SPLM/A). These groups had been fighting for the autonomy of South Sudan. While some provisions of the CPA were upheld, many contentious issues remain unresolved and present potential for further conflict.

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During the past two years, South Sudan has experienced increasing violence related to intercommunal conflict, conflict between the SPLM/A and irregular armed forces, and targeted attacks on civilians by the Lord's Resistance Army (LRA). The transitional areas along the North-South border (Abyei, Blue Nile and Southern Kordofan) continued to suffer from inter-tribal tensions, and are flashpoints for violence involving government troops of both sides as well as irregular armed groups.

According to an early 2011 report by the Office of the United Nations High Commissioner for Refugees (UNHCR), during the past two years South Sudan has experienced increasing violence, mostly related to armed militia groups, including LRA and inter-tribal clashes. There are also reports of human rights abuses by southern security forces, including the police and the Sudan People's Liberation Army (SPLA). These reported abuses range from arbitrary detention to the killing of civilians. The SPLA also continues to have child soldiers within its ranks. The United Nations (UN) Security Council established the United Nations Mission in the Republic of South Sudan (UNMISS) to assist with "functions relating to humanitarian assistance, and protection and promotion of human rights." As of May 31, 2011, UNMISS had 9,264 troops out of an authorized 10,000 total military personnel. UNMISS troops have sustained 60 fatalities since the mission deployed.

In January 2011, UNHCR reported that LRA violence displaced some 600,000 additional people in the previous 18 months and has brought "a radical shift in patterns of violence [that] points to a clear targeting of women and children." LRA attacks in the western part of South Sudan were reported on a monthly basis throughout 2010. In most cases, these attacks were on vulnerable, isolated communities, with indiscriminate killing, abduction, rape, mutilation, looting, and destruction of property.

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In addition to the recent violence in Abyei and South Kordofan, there have been other indications that the peace treaty remains fragile. In January and February 2011, factions of the SAF stationed in South Sudan's Upper Nile State engaged in violent clashes. Reports indicated that the soldiers were fighting over weapons and whether they will relocate to the North as ordered after the results of the referendum favored independence. By extension, the failure to demobilize the 180,000 soldiers from both Sudan and South Sudan as required by the CPA is of further concern.

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...According to the U.S. Agency for International Development (USAID), mass population displacement caused by conflict in South Sudan since early 2011 caused the loss of lean season food stocks. As a result, most of the displaced are now in crisis and are relying on food assistance. USAID projects that ongoing conflict will likely impact crop cultivation and harvests and that the situation could worsen significantly because of the compounding impacts of insecurity, displacement, high food prices, and returnees from Sudan who increase competition for scarce resources.

Insecurity due to ongoing fighting, and the targeting of civilians for serious human rights abuses, has led to continued displacement of the South Sudanese population. Displacement and factors related to food insecurity—including drought, flooding, and rising food prices—are at the root of the ongoing humanitarian crisis. South Sudan is already considered one of the poorest, least-developed places in the world. The mass influx of South Sudanese returning from Sudan continues to strain limited resources, and high levels of humanitarian needs are reported in areas that have a high concentration of returnees.

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3. Honduras and Nicaragua

On November 4, 2011, DHS announced the extension of the TPS designation for Honduras for 18 months, through July 5, 2013, based on the continued substantial disruption of living conditions in the country in the aftermath of Hurricane Mitch in 1998 and the finding that Honduras remains unable, temporarily, to handle adequately the return of its nationals. 76 Fed. Reg. 68,488 (Nov. 4, 2011). On the same day, DHS announced the extension of the TPS designation for Nicaragua for 18 months, through July 5, 2013, also based on the substantial impact of Hurricane Mitch in that country. 76 Fed. Reg. 68,493 (Nov. 4, 2011).

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Cross References

Real ID Act, **Chapter 3.A.3.**

Constitutionality of state laws concerning immigration, **Chapter 5.A.**

Protection of migrants, **Chapter 6.F.**

Recognition of South Sudan, **Chapter 9.B.1.**

Executive authority over passport issuance, **Chapter 9.C.**

Travel-related restrictions, **Chapter 16.A.1.a.** (Libya), **16.A.5.a.** (Congo), **16.A.6.b.** (Belarus), **16.B.2.** (implementing Security Council travel bans)

Atrocities Prevention, **Chapter 17.C.1**